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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/748,910	12/22/2003	Thomas Herrmann	BCR-10102/29	8376
25006	7590	01/03/2008	EXAMINER	
GIFFORD, KRASS, SPRINKLE, ANDERSON & CITKOWSKI, P.C PO BOX 7021 TROY, MI 48007-7021				ENGLE, PATRICIA LYNN
ART UNIT		PAPER NUMBER		
3673				
MAIL DATE		DELIVERY MODE		
01/03/2008		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte THOMAS HERRMANN

Appeal 2007-2736
Application 10/748,910
Technology Center 3600

Decided: January 03, 2008

Before DONALD E. ADAMS, DEMETRA J. MILLS, and RICHARD M. LEBOVITZ, Administrative *Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1-5. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The claimed invention is drawn to a sleeve of pliable material which serves as a cover for a grip of a spray bottle. Claims 1-15 are pending and

stand finally rejected under 35 U.S.C. § 103(a) as obvious over Davencens (U.S. Pat. No. 6,182,334 B1, Feb. 6, 2001) in view of Weil (U.S. Pat. No. 2,704,961, Mar. 29, 1955) (Answer 3).

Claims 1, 3, 4, 7, 8, 9, 11, 12, 14, and 15, which are representative of the appealed claims, read as follows:

1. For use with a spray bottle having a manually operated, elongated trigger-type grip, a cover for the grip, comprising:
 - a sleeve of pliable material having an open end, a closed end, an internal length, an internal cross-sectional dimension and a wall thickness; and wherein:
 - the length is on the order 2.5 cm or less;
 - the internal cross-sectional dimension is on the order of 1 cm or less; and
 - the wall thickness, including the closed end, is substantially consistent.
3. The cover of claim 1, wherein the internal cross section is rectangular.
4. The cover of claim 1, wherein the sleeve of pliable material is composed of a coextensive liner and overlay.
7. The cover of claim 1, wherein: the length measures from 1.35 to 1.4 cm; and the internal cross section is circular with a diameter measuring 0.4 to 0.5 cm.
8. The cover of claim 1, wherein the length measures from 2.0 to 2.5 cm; and the internal cross section is circular with a diameter measuring 0.35 to 0.4 cm.
9. The cover of claim 8, wherein the sleeve of pliable material is composed of a coextensive liner and overlay.

11. The cover of claim 1, wherein: the length measures approximately 2.0 cm; and the internal cross section is circular with a diameter measures approximately 0.5 cm.
12. The cover of claim 11, wherein the sleeve of pliable material is composed of a coextensive liner and overlay.
14. The cover of claim 1, wherein: the length measures approximately 1.5 cm; and the internal cross section is rectangular having internal cross-sectional dimensions of 0.1 by 0.5 cm, more or less.
15. The cover of claim 1, wherein: the length measures approximately 1.25 cm; and the internal cross section is rectangular having internal cross-sectional dimensions of 0.25 by 0.625 cm, more or less.

DISCUSSION

35 U.S.C. § 103, as applied by the Supreme Court in *Graham v. John Deere*, 383 U.S. 1 (1966), makes the factual inquiry into the scope and content of the prior art the starting point for consideration of obviousness. Thus, we begin with the Davancens and Weil patents which the Examiner relies upon for their descriptions of eyeglass end fasteners comprised of a pliable material (Answer 3).

Davancens describes an end fastener for attaching the end of an eyeglass holder cord to a temple leg of eyeglasses (Davancens, Abstract). As shown in Fig. 3 reproduced below, the end fastener (12) has an elongated elastomeric tubular shaped body (30), an open end, a hollow core (38) that extends from the open end through the body, and a base (32).

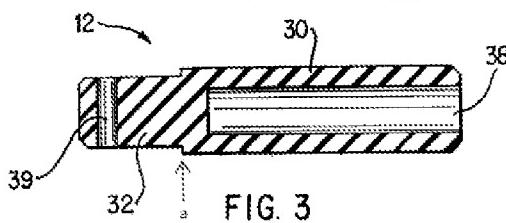


FIG. 3

The open end of the end fastener is adapted to receive a temple leg of eyeglasses (Davancens, at col. 3, ll. 7-9). A hole in the base 32, labeled 39 in Fig. 3, receives a ring for attaching a holder cord for the eyeglasses (Davancens, at col. 3, ll. 19-21). The holder cord can also be directly molded into the base (Davancens, at col. 3, ll. 65-66). Davancens does not describe the dimensions of the walls of the end fastener.

Weil describes a support for eyeglasses similar in structure to Davancens's, comprising a molded tube or sleeve "of rubber or like material" having a closed end and an open end to receive the temple leg of eyeglasses (Weil, at col. 1, ll. 76-78; Answer 3). A cord for wearing the eyeglasses around the neck is passed through a radial hole at "the closed end of" the tube (Weil, at col. 2, ll. 18-21; at col. 1, ll. 70-76).

Claims 1, 2, 5, and 6

Having established the scope and content of the prior art, we next compare the prior art to the claimed invention. We agree with the Examiner's findings that Davancens's end fastener meets the limitations of claim 1 of a "sleeve of pliable material" (elongated elastomeric tubular shaped body 30 of Fig. 3), "an open end" (Davancens, at col. 3, ll. 7-9), and

“a closed end” (base 32 of Fig. 3) (Answer 3; *see supra*). These elements are also found in Weil’s support for eyeglasses (Answer 3; *see supra*).

With respect to the differences between the prior art and the claimed invention, both the Examiner and the Appellant focus their arguments on the limitation of claim 1 that “the wall thickness, including the closed end, is substantially consistent.”

Appellant contends:

While, arguably, the end of the device of Davancens is “closed,” it certainly does not have a consistent wall thickness. Indeed, Davancens teaches away from a consistent wall thickness, since a point of novelty is an extension in the form of a base 32 which allows a cord to be retained or passed therethrough.

(App. Br. 2).

The Examiner finds, however, that Weil teaches “a uniform wall thickness [from] the open end to the closed end as seen in Fig. 4” (Answer 3). The Examiner also argues that when the closed end of Davancens’s fastener “is defined by the step or taper point (shoulder) where the closed end and an end of the base member are interconnected” (Answer 5), it has a consistent wall thickness with the fastener’s side walls (*see* 30 in Fig. 3). For clarity, we have annotated Fig. 3 above by adding an “a” to indicate the shoulder described by the Examiner.

Thus, the issue in this rejection is whether the dimensions recited in claim 1 – including “a pliable sleeve” in which “the wall thickness, including the closed end, is substantially consistent” – distinguishes the claimed spray bottle grip cover from the eyeglass end fasteners described in Davencens and Weil.

Analysis

“The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. . . . These cases have consistently held that in such a situation, the applicant must show that the particular range is *critical*, generally by showing that the claimed range achieves unexpected results relative to the prior art range.” *In re Woodruff*, 919 F.2d 1575, 1578 (1990) (internal citations omitted). Among the list of cases cited in *Woodruff* was *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 1345 (Fed. Cir. 1984), cert. denied, 469 U.S. 830 (1984), where an obviousness determination was affirmed because the dimensional limitations in the claims did not specify a device which performed any differently from the prior art.

In our opinion, the facts of this appeal fit squarely into *Gardner*. Appellant distinguishes the claimed grip cover from the prior art on the basis of having a “consistent wall thickness” (App. Br. 2) – the same type of dimensional limitation that the court in *Gardner* found inadequate by itself to establish a basis for patentability. Because Appellant has not shown that a cover with a “consistent wall thickness” performs any differently than the

prior art end fasteners nor that the recited dimensions achieve “unexpected results,” we conclude – based on the legal principles enunciated in *Gardner* and *Woodruff* – that claim 1 is not patentably distinct¹ from the end fasteners described in the cited Davancens and Weil patents.

Appellant also argues that Weil does not teach a closed end as recited in claim 1 because it has a small opening through which a cord is inserted (App. Br. 2). We do not find this argument persuasive. First, Davancens describes a closed end, and thus this feature is described in the prior art. Second, Davancens teaches that a cord can be attached to the closed end through a hole (Davancens, at col. 3, ll. 19-21) or by directly molding it into the base (Davancens, at col. 3, ll. 65-66). Thus, Davancens teaches that molding the cord directly into the end – without the need of a hole – is equivalent to attaching the cord through a hole in the base. *See also* Answer 6. Accordingly, we find that persons of skill in the art would have been motivated to attach the cord in Weil’s device by molding, rather than a hole, because Davancens teaches their equivalence. “[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an

¹ In reaching this conclusion, we do not find it necessary to rely on the Examiner’s findings that the figures in Davancens and Weil show sleeves with consistent wall thicknesses. Furthermore, because it is not evident that the devices of Davancens and Weil were drawn to scale, it is not clear that the proportions in the drawings are evidence of actual proportions. *See Hockerson-Halberstadt, Inc. v. Avia Group Int’l*, 222 F.3d 951, 956, (Fed. Cir. 2000); M.P.E.P 2125 (Edition 8, August 2001; revised September 2007).

arrangement, the combination is obvious.” *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007).

For the foregoing reasons, we affirm the rejection of claim 1. Claims 2, 5, and 6 fall with claim 1 (App. Br. 2).

Claim 3

Claim 3 is drawn to the grip cover of claim 1, where “the internal cross section is rectangular.” Appellant argues that neither “Davancens nor Weil includes a rectangular cross-section” (App. Br. 2).

We do not find Appellant’s argument persuasive. Davancens states that the “open end [of the end fastener] being adapted to receive a temple leg of eyeglasses” (Davancens, at col. 3, ll. 8-9). The term “adapted” means that the open end is modified to fit² the eyeglasses’ temple leg. We find that this reasonably suggests modifying the open end to any shape which would accommodate a temple leg, including a rectangular shape as recited in claim 3, when the temple leg is of rectangular shape. Thus, we affirm the rejection of claim 3.

Claim 4

Claim 4 further limits the cover of claim 1 to a “sleeve of pliable material . . . composed of a coextensive liner and overlay.” Appellant argues

² Adapt: “to make suitable to requirements or conditions; adjust or modify fittingly.” *Random House Dictionary* 15 (1982).

that there is no teaching in the prior art of a coextensive liner and overlay (App. Br. 3).

We do not agree. In Fig. 5A, Weil illustrates a cap 32 which overlays a sleeve 14a, which correspond to the overlay and a liner, respectively, as recited in claim 4 (Answer 7). The liner and overlay are coextensive along their width. Thus, Weil describes an embodiment which meets the limitations of claim 4.

Claims 7, 8, 11, 14, and 15

Claims 7, 8, 11, 14, and 15 are directed to the grip cover of claim 1, where specific measurements for its length and internal cross section are recited in each of the claims.

The Examiner contends that “discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 CCPA 1980)” (Answer 4). Appellant contends that “*In Re Boesch* . . . does not apply in this case. Appellant in this case is positively reciting certain measurements, and has not discovered an optimum value based upon experimental research” (App. Br. 3-4).

The Examiner has the better argument. As we have already found, Davancens teaches that the size of the end fastener is adapted to fit a temple leg of the eyeglasses (Davancens, at col. 3, ll. 8-9; *see supra* at p. 7). Thus, Davancens expressly teaches determining the “optimum value” for the dimensions of the end fastener to accommodate the temple leg. Appellant does not provide any evidence that the dimensions recited in claims 7, 8, 11,

14, and 15 perform any differently than the end fasteners disclosed in the prior art. *See Gardner supra.*

With respect to claims 14 and 15 which recite that the internal cross section is “rectangular,” we find this limitation to be reasonably suggested by Davencens for the same reasons set forth for claim 3 *supra*.

In sum, we affirm the rejections of claims 7, 8, 11, 14, and 15.

Claims 9-10

Claim 9, which depends on claim 8, is drawn to a grip cover comprising a sleeve, where “the sleeve of pliable material is composed of a coextensive liner and overlay.” Appellant states that claim 10 falls with claim 9 (App. Br. 3). Thus, we only need address claim 9.

Claim 9 is directed to the same limitation recited in claim 4. Thus, we affirm the rejection of claim 9 for the same reasons given for claim 4. Claim 10 falls with claim 9.

Claims 12-13

Claim 12, which depends on claim 11, is drawn to a grip cover comprising a sleeve, where “the sleeve of pliable material is composed of a coextensive liner and overlay.” Appellant states that claim 13 falls with claim 12 (App. Br. 4). Thus, we only need address claim 12.

Claim 12 is directed to the same limitation recited in claim 4. Thus, we affirm the rejection of claim 12 for the same reasons given for claim 4. Claim 13 falls with claim 12.

Appeal 2007-2736
Application 10/748,910

CONCLUSION

In summary, we affirm the rejection of claims 1-15 as obvious over Davencens in view of Weil.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

dm

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